

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CONSTANTINA DELGADO CRUZ,

CASE NO. 2:24-cv-1502

Petitioner,

## ORDER DENYING PETITIONER'S MOTION FOR A TRO

V.

TROY A. MILLER, United States  
Customs and Border Protection  
Commissioner, JASON OWENS,  
United States Border Patrol Chief,  
LLOYD EASTERLING, Chief Patrol  
Agent, Spokane Sector for the United  
States Border Patrol, PAUL BUDROW,  
Sheriff, Okanogan County Sheriff's  
Office Corrections Division, and  
PATRICK LECHLEITNER, United  
States Immigration and Customs  
Enforcement Acting Director,

## Respondents.

## 1. INTRODUCTION

Petitioner Constantina Delgado Cruz is a foreign national currently detained at the Northwest ICE Processing Center in Tacoma, Washington. She alleges Customs and Border Protection (“CBP”) agents violated the Fourth Amendment and 8 C.F.R. § 287.8 by stopping her without reasonable suspicion that she was engaged

1 in unlawful activity. Before the Court is Delgado Cruz's motion for a temporary  
2 restraining order ("TRO") seeking immediate release from detention because of  
3 CBP's alleged constitutional and regulatory violation. For the reasons stated below,  
4 the Court DENIES her motion for a TRO.

## 5                   **2. FINDINGS OF FACT**

6                   Considering the parties' briefing, supporting exhibits, oral argument, and the  
7 record, the Court finds the following:<sup>1</sup>

8                   Delgado Cruz is a native of Mexico. Dkt. No. 1 ¶ 4. She first entered the  
9 United States in 2003. Dkt. No. 6 at 6 ¶ 2. She remained in this country until 2009,  
10 when she traveled to Mexico to care for her dying mother. *Id.* ¶ 3. Delgado Cruz  
11 tried to return to the United States to reunite with her children after her mother's  
12 passing, but United States immigration officials and Federal Marshals apprehended  
13 her at the border. *Id.* ¶¶ 4, 5. "This encounter resulted in [Delgado Cruz's] removal,  
14 federal misdemeanor charges for illegal entry, and fraud . . . in connection with  
15 identification documents, as well as a twenty-year bar from reentry into the United  
16 States." *Id.* ¶ 5.

17                   In October 2009, Delgado Cruz reentered the United States and has lived  
18 here continuously for the last fifteen years. *Id.* ¶ 6. Delgado Cruz resides in  
19 Oroville, Washington, and has significant family ties in the United States, including  
20 five children all of whom reside here under lawful status. Dkt. No. 1 ¶¶ 24, 28.

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21                   <sup>1</sup> Findings of fact and conclusions of law made in connection with a temporary  
22 restraining order are not binding adjudications. *Hordphag Rsch. Ltd. v. Garcia*, 475  
23 F.3d 1029, 1035 (9th Cir. 2007). The Court may come to different, perhaps even  
opposite, conclusions as the case advances.

1 Delgado Cruz also serves as the primary caregiver to her three young  
2 grandchildren. Dkt. No. 6 at 6 ¶ 8. In the months to come, Delgado Cruz is  
3 expecting the birth of her fourth grandchild. *Id.* For the last four years, Delgado  
4 Cruz has been in a committed relationship with her boyfriend, who lawfully resides  
5 in the United States under an H-2A visa. *Id.* ¶ 9.

6 On September 17, 2024, Allen Cherry, Border Patrol Agent-Intelligence, was  
7 parked off Highway 97 near Oroville. Dkt. No. 10 at 1. At 3:45 p.m., Cherry saw a  
8 black Dodge Charger drive north past him and turn into a nearby residential  
9 neighborhood. *Id.* Cherry states that he recognized the Dodge Charger “as a vehicle  
10 of interest from previous intelligence gathering operations” and identified the  
11 license plate. *Id.* at 1-2. Cherry “conducted [a] records check” on his phone and  
12 discovered the vehicle was registered to Delgado-Cruz. *Id.* Cherry then found “a  
13 final order of removal from the United States” but “no records indicating that  
14 [Delgado Cruz] has legal status in the United States.” *Id.* at 2. He also found  
15 Delgado Cruz was convicted of illegal entry under 8 U.S.C. § 1325. *Id.*

16 Cherry followed Delgado Cruz as she parked in a back alley of the  
17 neighborhood. *Id.* Cherry states he was able to positively identify the driver as  
18 Delgado Cruz when she exited the car to grab bags from her trunk. *Id.* He then  
19 contacted Aaron Steffen, Border Patrol Agent. *Id.*

20 Cherry watched Delgado Cruz reenter her car, leave the back alley, and  
21 continue south on Highway 97. *Id.* Cherry followed Delgado Cruz in his unmarked  
22 vehicle. *Id.* Once Steffen caught up to Cherry, Cherry pulled over onto the shoulder  
23 and entered Steffen’s marked patrol car. *Id.* Steffen and Cherry pulled Delgado

1 Cruz over near Dwinell Cut Off road on Highway 97 at around 4:02 p.m. *Id.* at 3;  
 2 Dkt. No. 11 at 2.

3 Steffen says he spoke to Delgado Cruz and asked her whether “she was  
 4 illegally present in the United States.” Dkt. No. 11 at 2. Steffen says that she  
 5 responded “yes,” after which he placed Delgado Cruz under arrest and transported  
 6 her to the Oroville CBP Station. *Id.*; Dkt. No. 6 at 6 ¶ 15.

7 Delgado Cruz describes their encounter differently. She says CBP agents  
 8 requested her driver’s license and informed her they had a warrant for her arrest.  
 9 Dkt. No. 6 at 7 ¶ 13. When Delgado Cruz asked why they stopped her, CBP officers  
 10 told her it was due to “family ties and connections.” *Id.* ¶ 14. After being  
 11 fingerprinted and questioned, CBP held Delgado Cruz at the station until midnight  
 12 on September 18, 2024. *Id.* ¶¶ 15-16. CBP transferred Delgado Cruz to the  
 13 Okanogan County Corrections Center where she remained until her transfer to the  
 14 Northwest ICE Processing Center in Tacoma, Washington on September 19, 2024.  
 15 *Id.* ¶ 16.

16 Delgado Cruz remains detained at the Northwest ICE Processing Center,  
 17 under Immigration and Nationality ACT (INA) § 241(a)(5), Dkt. No. 9 ¶ 4, which  
 18 provides: “If . . . [an individual] has reentered the United States illegally after  
 19 having been removed . . . , the prior order of removal is reinstated from its original  
 20 date and is not subject to being reopened or reviewed, . . . and the alien shall be  
 21 removed under the prior order at any time after the reentry.” 8 U.S.C. § 1231.  
 22 Delgado Cruz expressed fear about returning to Mexico because of her siblings’  
 23 involvement with the local cartel. Dkt. No. 6 at 7 ¶ 15. On October 1, 2024, Delgado

Cruz had a “credible fear interview” with U.S. Citizenship and Immigration Services under 8 C.F.R. § 208.31. Neither party has informed the Court of the outcome of that interview.

### **3. CONCLUSIONS OF LAW**

### 3.1 Legal standard.

Preliminary injunctions and TROs are “extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis added). “The default rule is that a plaintiff seeking a preliminary injunction must make a clear showing that ‘[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.’”

*Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024) (quoting *Winter*, 555 U.S. at 20). This four-part test—the *Winter* factors—applies whenever preliminary injunctive relief is sought. *Winter*, 555 U.S. at 20.

Injunctive relief can take two forms: prohibitory and mandatory. “A prohibitory injunction prohibits a party from taking action” while “[a] mandatory injunction orders a responsible party to take action.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (internal quotation marks omitted). The parties agree Delgado Cruz seeks a mandatory injunction, and therefore, “she must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis in original); see also *Hernandez v. Sessions*,

1 872 F.3d 976, 999 (9th Cir. 2017) (quoting *Marlyn Nutraceuticals*, 571 F.3d at 879)  
2 (“Mandatory injunctions, while subject to a higher standard than prohibitory  
3 injunctions, are permissible when ‘extreme or very serious damage will result’ that  
4 is not ‘capable of compensation in damages,’ and the merits of the case are not  
5 ‘doubtful.’”).

6 The first *Winter* factor, “[l]ikelihood of success on the merits[,] is the most  
7 important factor[.]” *Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019). In the  
8 Ninth Circuit, courts apply a “sliding scale approach” under which “a stronger  
9 showing of irreparable harm to plaintiff might offset a lesser showing of likelihood  
10 of success on the merits.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131  
11 (9th Cir. 2011) (citation omitted). Under what is sometimes called the “serious  
12 questions” test, “[an] injunction could issue where the likelihood of success is such  
13 that serious questions going to the merits were raised and the balance of hardships  
14 tips sharply in [plaintiff’s] favor.” *Id.* (internal quotation marks omitted). “Serious  
15 questions are substantial, difficult and doubtful,” requiring further deliberation and  
16 investigation, but that cannot be resolved at the time an injunction is sought. *Gilder*  
17 *v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). In those cases, a TRO may  
18 issue to preserve the status quo or to order other injunctive relief. *See id.; see also*  
19 *Xuyue Zhang v. Barr*, 612 F. Supp. 3d 1005, 1012 (C.D. Cal. 2020); *Bent v. Barr*, 445  
20 F. Supp. 3d 408, 416 (N.D. Cal. 2020).

1       **3.2 Delgado Cruz has not made a clear showing of a likelihood of success**  
2       **on the merits.**

3           Delgado Cruz alleges CBP violated the Fourth Amendment and 8 C.F.R.  
4           § 287.8 by stopping her without a reasonable suspicion that she was engaged in  
5           criminal wrongdoing.<sup>2</sup> “The Fourth Amendment prohibits ‘unreasonable searches  
6           and seizures’ by the Government, and its protections extend to brief investigatory  
7           stops of persons or vehicles that fall short of traditional arrest.” *United States v.*  
8           *Willis*, 431 F.3d 709, 714 (9th Cir. 2005) (quoting *United States v. Arvizu*, 534 U.S.  
9           266, 273 (2002)). “Such investigatory stops are justified by ‘reasonable suspicion’  
10          that criminal activity may be afoot.” *Id.* Reasonable suspicion is formed by “specific,  
11          articulable facts which, together with objective and reasonable inferences, form the  
12          basis for suspecting that the particular person detained is engaged in criminal  
13          activity.” *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000). 8 C.F.R.  
14          § 287.8(b) offers “at least as much protection as the Fourth Amendment” in that it  
15          requires immigration officials to have a “reasonable suspicion” before a detention.  
16          *Perez Cruz v. Barr*, 926 F.3d 1128, 1137 (9th Cir. 2019). The government has the  
17          burden of production of coming forward with “specific and articulable facts” to  
18          support reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Willis*, 431 F.3d  
19          at 715 n.5 (“the officer has satisfied the government’s burden of production by  
20          21          \_\_\_\_\_

22          <sup>2</sup> Delgado Cruz conceded at oral argument that once stopped, the officers had  
23          probable cause to arrest her once she was positively identified and admitted that  
she was in the country unlawfully. Thus, the only governing law that guides the  
Court’s merits inquiry relates to “reasonable suspicion.”

1 coming forward with ‘specific and articulable facts,’ ... to support his suspicion of  
 2 illegal activity.”).

3       Here, the Government has proffered declarations with specific and  
 4 articulable facts that show at least a minimal level of objective justification for  
 5 stopping Delgado Cruz. Thus, setting aside matters of credibility, there is evidence  
 6 from which to conclude that the CBP officers had a reasonable suspicion that  
 7 Delgado Cruz was in the United States unlawfully and to stop her.<sup>3</sup> Delgado Cruz  
 8 tries to poke holes in the officers’ factual account, arguing that Cherry’s claim of  
 9 recognizing “a vehicle of interest from previous intelligence gathering operations”  
 10 “is so vague as to be completely meaningless” and “[t]here are reasons to doubt that  
 11 a ‘positive identification’ from an unknown distance and presumably using a  
 12 photograph taken approximately 15 years prior constitute reasonable suspicion[.]”  
 13 Dkt. No. 12 at 9-10. She also argues that the Government’s supporting declarations  
 14 make no mention of the “family ties and connections” justification an officer told  
 15 Delgado Cruz, nor do they explain why “[t]he mere existence of [Delgado Cruz’s]  
 16 prior removal order” establishes articulable evidence of unlawful activity. *Id.*  
 17 Delgado Cruz also questions the ability of the agents to perform a thorough records  
 18 check within 17 minutes while driving behind her. *Id.* at 8.

19       To be sure, these are legitimate questions about the legality of the stop, and  
 20 they call for further exploration and scrutiny. But they are not so substantial,

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21       <sup>3</sup> It does not matter whether Delgado Cruz’s detention is considered under 8 C.F.R.  
 22 § 287.8 or under the Fourth Amendment, because the regulatory standards are at  
 23 least as stringent as those imposed by the Fourth Amendment. *Perez Cruz*, 926 F.3d  
 at 1137.

1 difficult, and doubtful as to raise “serious questions” going to the merits of her  
 2 Fourth Amendment claim or to tip the scales in favor of her immediate release from  
 3 detention. And with no contrary evidence showing, for example, that CBP’s so-called  
 4 “intelligence gathering operation” was ill-investigated, uninformed, contrary-to-  
 5 statute, or that her arrest was somehow retaliatory, Delgado relies on skepticism  
 6 and speculation to carry the day. If that’s all it took, however, to merit injunctive  
 7 relief, courts would be rendered more “spectator[s] than … referee[s] when it comes  
 8 to matters of equity.” *Starbucks*, 144 S.Ct. at 1578. To the extent there are factual  
 9 conflicts between Delgado Cruz’s and the CBP officers’ declaration, they only create  
 10 more doubt about the probability of her success. *See id.* (citing 11A C. Wright, A.  
 11 Miller, & M. Kane, Fed. Prac. & Proc. § 2948.3 (3d ed. 2013)).

12 Accordingly, the Court finds that Delgado Cruz has not satisfied the  
 13 “threshold inquiry” of likely success on the merits.<sup>4</sup> Because she has failed to meet  
 14 the first *Winter* factor, the Court need not consider the remaining factors. *Baird v.*  
 15 *Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (quoting *Disney Enters., Inc. v. VidAngel,*  
 16 *Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)).

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 19     <sup>4</sup> Delgado Cruz confirmed during oral argument that she does not presently allege  
 20 that CBP racially profiled her or that CBP’s stated reasons for stopping her are a  
 21 pretext for discrimination. This is significant because the Fourth Amendment  
 22 outlaws the pernicious practice of stopping and questioning people about their  
 23 citizenship and immigration status when the *only* ground for suspicion is racial  
 profiling. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884-887 (1975); *see also*  
*United States v. Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992). This type of race-  
 based policing is “repugnant under any circumstances” and an “egregious” violation  
 of the Constitution and 8 C.F.R. § 287.8(b)(2). *Sanchez*, 904 F.3d at 656.

**3.3 Questions about the Court's continued jurisdiction also weigh against an injunction.**

Having found that Delgado Cruz has failed to show a likelihood of success on the merits, the Court turns to a separate issue that weighs against an injunction and that may eventually divest the Court of jurisdiction.

Delgado Cruz requests her immediate release from detention, arguing that a stop that violates the Fourth Amendment “can completely invalidate removal proceedings, requiring termination.” Dkt. No. 12 at 6 (citing *Sanchez*, 904 F.3d 643, 655 (9th Cir. 2018)). But it’s not clear, and Delgado Cruz does not clarify, what “invalidating removal proceedings” means in this context.

If Delgado Cruz is challenging a reinstated removal order, the Court may not have jurisdiction over this matter. “The REAL ID Act ‘expressly eliminated habeas review over all final orders of removal,’ *A. Singh v. Gonzales*, 499 F.3d 969, 977 (9th Cir.2007), and provided that a petition for review in the court of appeals is the ‘sole and exclusive means for judicial review of an order of removal,’ 8 U.S.C. § 1252(a)(5).” *Singh v. Holder*, 638 F.3d 1196, 1210 (9th Cir. 2011), abrogated on other grounds by *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1196 (9th Cir. 2022).

That said, Congress did not intend the REAL ID Act to “preclude habeas review over challenges to detention that are independent of challenges to removal orders.” *Id.* at 1211. Without observing this limit to the REAL ID Act, federal courts would be barred from considering any constitutional claims arising during a stop or arrest simply because they are “tangentially related to the [government’s] decision

1 to commence removal proceedings.” *Gupta v. McGahey*, 737 F.3d 694, 699 (11th Cir.  
2 2013).

3 Neither party addresses this point in their briefing. Given the Court’s  
4 continuing obligation to affirm its own jurisdiction, Delgado Cruz fails to assure her  
5 petition stands alone even if, as a technical point, it does not directly challenge the  
6 validity of her reinstated removal order.

7 **3.4 Delgado Cruz is not yet under immediate threat of removal.**

8 Delgado Cruz argues that, absent a TRO, she may be removed “long before  
9 the merits of this case are otherwise reached, subjecting her to irreparable harm.”  
10 Dkt. No. 12 at 11. But Delgado Cruz is seeking withholding of removal based on her  
11 fear of returning to Mexico. The Government has assured the Court that Delgado  
12 Cruz will not be removed while her claims are being considered. The Court orders  
13 the Government to provide Delgado Cruz and the Court at least 14 days’ notice  
14 before the date set for Delgado Cruz’s deportation so that she may seek further  
15 relief from this Court or the Ninth Circuit, if appropriate.

16 **3.5 The Court grants Delgado Cruz leave to amend her petition.**

17 The Government argues the Court should dismiss Delgado Cruz’s habeas  
18 petition because she names the wrong defendant. In response, Delgado Cruz argues  
19 that her counsel could not identify her location at the time they filed her petition.  
20 As a result, the Court should grant Delgado Cruz leave to amend now that her  
21 location is settled. The Court agrees with Delgado Cruz and grants her leave to  
22 amend within 10 days of the date of this Order.

1                           **4. CONCLUSION**

2                           In sum, the Court DENIES Delgado's petition for a TRO and GRANTS her  
3 leave to amend her petition within 10 days of the date of this Order. The Court also  
4 ORDERS the Government to provide Delgado Cruz and the Court 14 days' notice  
5 before the date set for Delgado Cruz's deportation from this country.

6                           Dated this 7th day of October, 2024.

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8                           Jamal N. Whitehead  
9                           United States District Judge

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